Toffoloni v. LFP Publishing Group, LLC Doc. 29 Att. 2

NO. 08-16148-G

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
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ATLANTA, GA.

MAUREEN TOFFOLONI,
as Administrator and Personal
Representative of the Estate of
Nancy E. Benoit,
Plaintiff-Appellant,
v.
LFP PUBLISHING GROUP, LLC,
d/b/a Hustler Magazine, et al.,
Defendant-Appellee.

Appeal from the United States District Court For the Northern District of Georgia
1:08-CV-0421 (TWT)

PETITION FOR REHEARING *EN BANC*

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Certificate of Interested Persons and Corporate Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate procedure and Eleventh Circuit Rules 26.1-1 and 26.1-2, Defendant-Appellee LFP Publishing Group, LLC certifies that the following is believed to be a full and complete list of all trial judge(s), attorneys, persons, associations, firms, partnerships, or corporations that have an interest in the outcome of this appeal; LFP Publishing Group, LLC certifies that its parent company is LE Publishing Advisors, LLC, and no publicly held corporation owns 10% or more of its stock:

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13. Samansky, Mark—Defendant

14. Thrash, Hon. Thomas W., United States District Judge, Northern District of Georgia

15. Toffoloni, Maureen—Plaintiff/Appellant

FED. R. APP. P. 35(b) AND 11TH CIR. R. 35-6(c) STATEMENT OF COUNSEL FOR PETITIONER

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following questions of exceptional importance:

1. Whether the Panel's decision amounts to content-based discrimination against speech prohibited by the guarantee of the freedom of the press under the First Amendment to the U.S. Constitution.

2. Whether the Panel's decision should be left un-reviewed although it causes substantial uncertainty regarding the media's right to comment and publish on matters of public interest, and will result in an unconstitutional chilling effect on the freedom of the press under the First Amendment.

3. Whether the Panel's decision is based on an unconstitutional and erroneous interpretation and application of the Georgia common law right of publicity as that tort is defined by the Georgia Supreme Court.

I also express a belief, based on a reasoned and studied professional judgment, that the Panel decision is contrary to the United States Supreme Court decisions in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S. Ct. 2849 (1977) and *Time v. Hill*, 385 U.S. 374, 87 S. Ct. 534 (1967).

Respectfully submitted,

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STATEMENT OF ISSUES MERITING EN BANC CONSIDERATION

1. Whether the Panel's decision amounts to content-based discrimination against speech prohibited by the freedom of the press guaranteed by the First Amendment to the U.S. Constitution?

2. Whether the Panel's decision should be left un-reviewed although it causes substantial uncertainty regarding the media's right to comment and publish on matters of public interest, and will result in an unconstitutional chilling effect on the freedom of the press under the First Amendment?

3. Whether the Panel's decision is based on an unconstitutional and erroneous interpretation and application of the Georgia common law right of publicity as that tort is defined by the Georgia Supreme Court?

STATEMENT OF PROCEEDINGS AND DISPOSITION OF THE CASE

This is a lawsuit brought by Plaintiff/Appellant Maureen Toffoloni (hereinafter "Plaintiff") as Administrator of the Estate of her late daughter, Nancy Benoit against Defendant/Appellee LFP Publishing Group, LLC ("LFP"), publisher of the internationally known adult-themed gentlemen's publication, *Hustler* Magazine. The action concerns the publication by LFP of a two-page news article on the life and death of Ms. Benoit, published in the March 2008 issue of *Hustler*, including nude photographs of Ms. Benoit made from a videotape previously prepared by Defendant Mark Samansky ("Samansky").[1]

Plaintiff commenced this action in the Superior Court of Fayette County, Georgia, seeking a temporary restraining order to prevent publication of the subject

[1] Samansky previously filed for bankruptcy in the District of Colorado, and has not appeared in this proceeding. Samansky is not represented by counsel for LFP.

photographs in *Hustler* and asserting a single substantive cause of action for damages for violation of the Georgia common law right of publicity. LFP removed the case to the district court for the Northern District of Georgia, based on diversity of citizenship. The district court denied Plaintiff's motion for a temporary restraining order and for a preliminary injunction, and she served her Complaint.

Defendant LFP moved to dismiss the action for failure to state a claim for relief pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court dismissed the case and Plaintiff appealed. On June 25, 2009, a Panel of this Court reversed the dismissal and reinstated the Complaint. Defendant LFP now respectfully petitions the entire Court for en banc review of the Panel's Order in order to correct the Panel's grave constitutional error.

STATEMENT OF FACTS NECESSARY TO ARGUMENT OF THE ISSUES

On this motion to dismiss for failure to state a claim for relief, the facts are taken from the Plaintiff's Complaint.

Plaintiff Toffoloni is the mother and Administrator the Estate of the late Nancy Benoit. In June 2007, Ms. Benoit and her son (Plaintiff's grandson) were murdered by Ms. Benoit's husband, the well-known professional wrestler Chris Benoit, who then committed suicide. At the time of her murder, Ms. Benoit was herself a model and professional woman wrestler, and a well-known public figure in her own right. (Complaint, ¶ 15).

Some 20 years before her death, Ms. Benoit voluntarily posed for a number of nude and seminude photographs, as well as a videotape, by Mark Samansky, a professional photographer. (Complaint, ¶¶ 3,9). After the photographs and videotape were taken, Ms. Benoit allegedly changed her mind about having them published, and instead requested Samansky to destroy them. While allegedly agreeing to do so, Samansky apparently destroyed the photographs but kept the videotape. (Complaint, ¶¶ 12, 13). After the Benoit murder-suicide became national news, Samansky retrieved the videotape, extracted photographs therefrom, and conveyed the right to publish the copyrighted images to LFP for publication in *Hustler* Magazine. (Complaint, ¶¶16, 17).

When Plaintiff learned about the forthcoming publication of the nude and seminude photos of Ms. Benoit in *Hustler*, she demanded that publication cease. Plaintiff brought suit and sought a temporary restraining order against the publication. By the time Plaintiff's suit was filed in February 2008, the photographs of Ms. Benoit had already been published in the March 2008 issue of *Hustler*.

Plaintiff asserted a single substantive cause of action pursuant to the Georgia common law posthumous right of publicity on behalf of Ms. Benoit. LFP moved to dismiss pursuant to Rule 12(b)(6), which motion was granted by the Hon. Thomas Thrash, and Plaintiff appealed. The dismissal was reversed by this Panel on June 25, 2009; the decision is currently reported at 2009 WL 1793180.

The photographs of Benoit were part of an exclusive two page news article on her life and death in the March 2008 issue of *Hustler*. LFP asserts that as part of a news story of legitimate public concern, the article does not and cannot violate the Georgia right of publicity. Moreover, should it be found to do so, then such a ruling would clearly violate LFP's right of freedom of the press guaranteed by the First Amendment to the United States Constitution. Finally, the First Amendment requires that the decision whether or not to publish otherwise lawful, non-obscene photographs should be made by the editors of *Hustler*, not the courts.

ARGUMENT AND AUTHORITY

I. FUNDAMENTAL CONSTITUTIONAL RIGHTS ARE IMPAIRED BY THE PANEL'S DECISION AND REQUIRE REHEARING

Rehearing should be granted because this case directly implicates the boundaries of the First Amendment guarantee of freedom of the press and, more specifically, the right of the press to report on the life of a conceded celebrity in connection with an incident of great public interest. Remarkably, the Panel's decision includes no meaningful discussion or analysis of the First Amendment rights abridged by its Order and asserted by LFP, or the U.S. Supreme Court precedents which control such an analysis. The Panel's failure to address such a fundamental constitutional issue alone merits rehearing. Equally significant is the Panel's disregard of the limited parameters of the Georgia common law claim for right of publicity, and misconstruction of that tort by imputing into that tort elements of a wholly different (and unasserted) claim for publication of private facts under Georgia law.

II. THE PANEL DECISION CONFLICTS WITH THE FIRST AMENDMENT RIGHT OF THE PRESS TO REPORT ON A MATTER OF PUBLIC INTEREST AND PERMITS THE UNCONSTITUTIONAL EXERCISE OF EDITORIAL CONTROL OVER THE PRESS

Despite the Panel's effort to portray this as a case about limitations on the right of the press to publish private facts, the issue in this case is quite different: whether the courts may limit the right of the press -- here, *Hustler* Magazine -- to comment on the life and career of a deceased celebrity in connection with her sensational murder without liability for commercial appropriation of her name and image. The parameters of *Hustler*'s right to participate in such commentary are established by the First Amendment, as interpreted by the U.S. Supreme Court; and no state law claim -- including the Georgia common law claim for right of publicity -- can alter or diminish that right.

The U.S. Supreme Court has repeatedly prohibited censorship of the press by the courts and rejected the contention that the courts may dictate how -- or when

-- the press may report on or publish matters of public interest.[2] The other federal appellate courts have followed the U.S. Supreme Court's direction regarding the danger of the courts' substituting their own judgment regarding what is newsworthy.[3]

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[2] *See Time v. Hill*, 385 U.S. 374, 388, 87 S. Ct. 534, 542 (1967) ("the guarantees for speech and the press are not the preserve of political expression or comment upon public affairs . . . . 'No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression.' . . . 'The line between the informing and the entertaining is too elusive for the protection of (freedom of the press).'") (citation omitted); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346, 94 S. Ct. 2997, 3010 (1974) ("[I]t would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not -- to determine, in the words of Mr. Justice Marshall, 'what information is relevant to self-government.' We doubt the wisdom of committing this task to the conscience of judges."); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49, 104 S. Ct. 3262, 3267 (1984) ("[a] determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers," and because the courts' approval or disapproval of a photograph is thus necessarily message dependent, such content-based discrimination cannot be tolerated under the First Amendment.); *Harper & Rowe Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561, 105 S. Ct. 3218, 3231 (1985) (the Court per Justice O'Connor, in citing the Second Circuit dissent in the opinion below, stated: "As Judge Meskill wisely noted, '[c]ourts should be chary of deciding what is and what is not news.'").

[3] *See, e.g., Lerman v. Flynt Distributing Co.*, 745 F.2d 123, 139 (2d Cir. 1984) *cert. denied*, 471 U.S. 1054, 105 S. Ct. 2114 (1985) ("Courts are, and should be, reluctant to define newsworthiness"); *Lowe v. Hearst Communications, Inc.*, 487 F.3d 246, 251 (5th Cir. 2007) ("[W]e are not prepared to make editorial decisions for the media regarding information directly related to matters of public concern" . . . . This Circuit has declined to get involved in deciding the newsworthiness of specific details in a newsworthy story where the details were "substantially related" to the story (rejecting challenge even where media's use of certain

The Panel's decision includes no analysis of, or even lip service to, those important U.S. Supreme Court and federal circuit court decisions informing how conflicts between the freedom of the press and such state laws must be resolved. Nor does the Panel decision include a substantive discussion of *Hustler*'s constitutional right to publish its admittedly adult-oriented perspective on Ms. Benoit's career. Instead, without reference to those guiding cases, the Panel decision impermissibly gives the courts control over what editorial content is appropriate for the media to publish, and what is not. Indeed, the Panel reserved for itself the right to determine what limited aspects of Ms. Benoit's life and career are worthy of the public's right to know, and imposed its own social values and interests on the editors and readers of *Hustler*.

In doing so, the Panel decision committed unconstitutional content discrimination based on its own perception of what the public may legitimately find interesting or informative. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, 115 S. Ct. 2510, 2516 (1995) ("It is axiomatic that the

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material "reflected the media's insensitivity" and "embarrassed" subject of article) (citations omitted); *see also Anderson v. Suiters*, 499 F.3d 1228, 1236 (10th Cir. 2007) ("Anderson argues the videotape was highly personal and intimate in nature. While the sensitive nature of the material might make its disclosure highly offensive to a reasonable person, that does not make the videotape any less newsworthy so long as the material as a whole is substantially relevant to a legitimate matter of public concern . . . Other courts also appear to give 'public interest' status to news material on an aggregate basis, rather than itemizing what is in the news report would qualify and what could remain private.").

government may not regulate speech based on its substantive content or the message it conveys."); *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 382, 112 S. Ct. 2538, 2542 (1992) ("content-based regulations are presumptively invalid").

There is no dispute that Ms. Benoit's murder was newsworthy; and the Panel recognized and conceded that the fact that Ms. Benoit posed nude as a young woman is a matter of public interest and therefore "newsworthy." *See* Slip Op. at 13 ("The biographical piece, in and of itself, certainly falls within the newsworthiness exception.")[4] But, paradoxically, the Panel determined that the public is only entitled to read about the photos, not view them.[5] This holding contradicts the long-standing recognition by the courts that the use of a picture in a newspaper or magazine in connection with an item of news is a constitutionally-protected, lawful exercise of the free press. *See, e.g., Waters*, 212 Ga. at 167, 91 S.E.2d at 348; *see also Gilbert v. Medical Economics Co.*, 665 F.2d 305, 308 (10th Cir. 1981) (news is "any information disseminated 'for purposes of education, amusement or enlightenment . . .", and collecting cases illustrating this standard has been accepted generally by courts) (emphasis added).[6] The public cannot properly be said to have a legitimate interest in the fact that Ms. Benoit posed for

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[4] Notably, *Hustler's* reporting on the earliest phase of Ms. Benoit's career was exclusive; the public could learn that Ms. Benoit started her remarkable career with the ambition to be a nude model from no other media source.

[5] The Panel's rulings that the photos are not "newsworthy" because they depict nudity (Slip Op. at 13) and because they are "old" (*id.* at 19) are unconstitutional. It is established law that the First Amendment protects even indecent, non-obscene expression, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874-75, 117 S. Ct. 2329, 2346 (1997), and equally settled that there is no "timeliness" limitation to the constitutional guarantees of speech and the press. *See Time*, 385 U.S. at 388, 87 S. Ct. at 542 ('No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression.')*; see also Waters v. Fleetwood*, 212 Ga. 161, 165, 91 S.E.2d 344, 347 (1956) (discussing *Smith v. Doss*, 251 Ala. 250, 37 So.2d 118, 120 (1948) and its holding that "[t]he passage of time could not give privacy to [plaintiff's] acts because the story of [plaintiff] is a part of the history of the community...."); *Time, Inc. v. Johnston*, 448 F.2d 378, 381-82 (4th Cir. 1971) ("No rule of repose exists to inhibit speech relating to the public career of a public figure so long as newsworthiness and public interest attach to events in

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such public career."); *William O'Neil & Co., Inc. v. Validea.com Inc.*, 202 F. Supp. 2d 1113, 1117 (C.D. Cal. 2002) ("The 'news' exception is not restricted to current events: [the press] may legitimately inform and entertain the public with the reproduction of past events....") (interior citations and quotations omitted); *Carlisle v. Fawcett Publications, Inc.*, 201 Cal. App. 2d 733, 746, (Cal. Dist. Ct. App. 1962) ("If the necessary elements which would permit the publication of factual matter are present, mere lapse of time does not prohibit publication."); *Montesano v. Donrey Media Group*, 99 Nev. 644, 655, 668 P.2d 1081, 1088 (Nev. 1983) (news story privileged "even though the publication occurred 20 years after the incident reported therein.")

[6] Indeed, but for its admittedly adult-perspective, *Hustler's* exclusive article about Ms. Benoit's remarkable career trajectory is, at its core, no different from the thousands of media retrospectives about other recently deceased celebrities, including Michael Jackson and Farrah Fawcett, lawfully accompanied by photos of the subject public figures at various stages of their long careers.

This example also illustrates why the Panel decision's suggestion (Slip Op. at 20) that Ms. Benoit's alleged desire to keep the nude photos from publication may properly limit the freedom of the press to otherwise publish them in connection with a retrospective, is not constitutionally sound. The desires of a public figure regarding the publication of newsworthy photos cannot be the test either under the law of privacy or the First Amendment, else any celebrity who does not wish the publication of unflattering pictures could prevent the publication thereof.

nude photographs early in her career, but an illegitimate interest in the photographs themselves.

This absurd result illustrates why the Panel's decision cannot be squared with the First Amendment; and why, if left un-reviewed, the chilling effect on the media will be profound. The First Amendment cannot tolerate a landscape in which the subject matter of an article is conceded to be newsworthy and constitutionally protected, but photos illustrating that story may be found by a court to lack such protection because the court finds the news story pretextual after its publication. To allow the Panel decision to stand would let the constitutional protection for true, non-obscene speech about current news events depend upon the attainment of post-publication, judge-devised standards of currency and pertinence.

The press depends upon the consistency of the courts' application of these constitutional principles, and without such predictability, fear of liability "would present a great hazard of discouraging the press from exercising the constitutional guarantees . . . and thus 'create the danger that legitimate utterance will be penalized.'" *Time*, 385 U.S. at 389, 87 S. Ct. at 543 (cits. omitted).

In short, whether *Hustler*'s publication was tasteful or not, the photographs of Ms. Benoit, standing alone, are "newsworthy" and their publication protected by the First Amendment. Tolerance of such speech is necessary "in a society which places a primary value on freedom of speech and of press." *Id.*, 385 U.S. at 388, 87 S. Ct. 542.

III. THE PANEL DECISION IS BASED ON AN ERRONEOUS INTERPRETATION OF THE GEORGIA COMMON LAW RIGHT OF PUBLICITY

The bulk of the Panel's decision analyzes Plaintiff Toffoloni's lone claim for violation of the Georgia common law posthumous right of publicity under the standards various courts have applied to claims for public disclosure of embarrassing private facts. *See* Slip Op. at 18-21.[7] (Indeed, the Panel's decision notably places substantial importance on the fact that Ms. Benoit "allegedly . . . expressly did not wish [the nude photos of her] made public." *Id.* at 20.) Although both torts are derived generally from the "law of privacy," each is a distinct claim with distinct and different elements and, more importantly, different interests sought to be protected. They are not analogous torts in any way, and the Panel's conflation of these torts in its decision is a serious error which has resulted in an unconstitutional application of the Georgia right of publicity and requires correction.

As the U.S. Supreme Court has recognized, the differences between the two torts are "important" because "the State's interests in providing a cause of action in each instance are different." *Zacchini*, 433 U.S. at 573, 97 S. Ct. at 2856.[8] Georgia's right of publicity seeks to redress the commercial appropriation of the value associated with a person's name, photograph, etc. *See Cabaniss v. Hipsley*, 114 Ga. App. 367, 151 S.E. 2d 496 (1966). "The State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment." *Zacchini*, 433 U.S. at 573, 97 S. Ct. at 2856.[9] Unlike the other privacy-derived torts, "the right of publicity survives the death of its owner." *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc.*, 250 Ga. 135, 143, 296 S.E.2d 697, 703 (1982). Further, the right of publicity is expressly limited to those circumstances in which the claimant's name or photograph "is not authorized as an exercise of freedom of the press."

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[7] The Panel's decision relies heavily upon the commentary "on the permissible publicity of private facts in the Restatement (Second) of Torts," Slip Op. at 18, and in a variety of cases from foreign jurisdictions addressing claims for publication of private facts, as opposed to right of publicity, *id.* at 20-21.

The interest protected by the Georgia tort of public disclosure of private facts, however, "is that of reputation, with the same overtones of mental distress that are present in libel and slander." *Ramsey v. Georgia Gazette Publishing Co.*, 164 Ga. App. 693, 696, 297 S.E.2d 94, 96 (1982). Accordingly, unlike the right of publicity, the viability of such a claim dies with the individual.[10] Because Nancy Benoit died before any cause of action was asserted, only a right of publicity, as opposed to a right of privacy based on publication of private facts, remains available to Ms. Toffoloni.

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[8] A claim for right of publicity is a "discrete kind of 'appropriation' case" that, other than also deriving from the "law of privacy" . . . [has] almost nothing in common [with the other privacy-derived torts] except that each represents an interference with the right of the plaintiff . . . 'to be let alone." *Zacchini*, 433 U.S. at 572 n.7, 97 S. Ct. at 2855.

[9] The focus of such a claim is "on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation." *Zacchini*, 433 U.S. at 573, 97 S. Ct. at 2856. In other words, the right of publicity claim presupposes that the claimant has an interest in making his "act" public and profiting therefrom, and "the only question is who gets to do the publishing." *Id.*

The cases and constitutional principles relied upon by the Panel in the decision -- including the Restatement (Second) of Torts and other courts' analyses of the concept of "newsworthiness" in the context of a publication of private facts tort -- balance the First Amendment right to publish private facts against the harm such publication poses to the claimant's reputation and right to continue living a life of seclusion without public discourse of the allegedly private facts. These authorities do not, however, balance this right against the commercial value of the publication. Simply put, reputational concerns are inapposite to a claim for right of publicity (particularly where, as here, the claimant is deceased). And as discussed *supra*, the First Amendment analysis applicable to a right of publicity claim necessarily differs from a claim for publication of private facts. Such analysis is completely absent from the Panel's decision.

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[10] Privacy rights "die with the person whose privacy was allegedly invaded. Both the commentators and the cases unanimously support this rule." J. Thomas McCarthy, The Rights of Publicity and Privacy, § 9:1 (2d ed. 2008).

The Panel's attempt to distinguish *Waters* from the instant case because photographs of the murdered girl in *Waters* were contemporaneous with the event, as opposed to illustrative photos from years before the "triggering" news event, must fail. (Slip Op. at 19). "Old" news is no less protected than "new" news; nor is there an exception to constitutional protection for "old" photos that are otherwise newsworthy. *Time*, 385 U.S. at 388, 87 S. Ct. at 542; see also FN 5, *supra*. Ms. Benoit was a conceded public figure long before her murder. (Complaint, ¶ 15.) And because the *Hustler* article on Ms. Benoit's life was concededly of public interest, including the fact that she voluntarily posed nude as a young woman, Slip Op. at 13, the photographs illustrating that part of her life were newsworthy as well, and accordingly not a violation of her right of publicity under Georgia law.

Finally, some discussion of the relevant portions of the opinion in *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985), is appropriate given the Panel's extensive reference to that decision. *Douglass* is clearly and obviously distinguishable from the instant case. There, plaintiff was a living person entitled to assert "false light" and other privacy claims, and her nude photos were not remotely related to a newsworthy story of national media concern; in other words, there was no event of public interest (such as a sensational murder) that thrust her into the news and made her the subject of public interest. Notably, the Seventh Circuit wrote with regard to lack of consent for publication:

> To forbid *Hustler* to publish any photographs of people without their consent, merely because it is an offensive, though apparently a lawful, magazine, would pretty much put *Hustler* out of the news business, would probably violate the First Amendment, and would in any event cross outside the accepted boundaries of the right of publicity.

Id., 769 F.2d at 1139.

As a final point, the Panel's suggestion that, "[o]n these facts, were we to hold otherwise, LFP would be free to publish any nude photographs of almost anyone without their permission, simply because the fact that they were caught nude on camera strikes someone as 'newsworthy'" is entirely misplaced. (Slip Op. at 21.) Ms. Benoit was not "almost anyone." She was a celebrity long before she was murdered by her also famous husband, at which point her right to privacy extinguished. Had she been alive when photographs she allegedly wished to remain private were published without her consent, this would concededly be a far different case with regard to her right of privacy, as in *Douglass*. Here, the publication of nude, but non-obscene, non-sexually explicit photographs of Ms. Benoit as part of an article on her life and death cannot lawfully be deemed an actionable "commercial appropriation."[11]

CONCLUSION

For the foregoing reasons, LFP's Petition for Rehearing En Banc should be granted.

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[11] *See Maples v. National Enquirer*, 763 F. Supp. 1137 (N.D. Ga. 1990).

Dated: July 16, 2009

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of July, 2009, I served via hand delivery the foregoing **Petition For Rehearing *En Banc*** to the following attorney of record:

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Respectfully submitted this 16th day of July, 2009.

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
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No. 08-16148

D. C. Docket No. 08-00421-CV-TWT-1

MAUREEN TOFFOLONI,
as Administrator and Personal Representative
of the Estate of Nance E. Benoit,

Plaintiff-Appellant,

versus

LFP PUBLISHING GROUP, LLC,
d.b.a. Hustler Magazine,
MARK SAMANSKY,
an individual,
DEFENDANTS X, Y, AND Z,
other distributors and sellers
of Hustler Magazine,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(June 25, 2009)

Exhibit A

Before WILSON and ANDERSON, Circuit Judges, and GOLDBERG,* Judge.

WILSON, Circuit Judge:

This case involves the newsworthiness exception to the Georgia state law "right of publicity," which arises out of the constitutional right to privacy. The district court found that LFP Publishing Group, LLC's ("LFP") publication of twenty year old nude photographs of Nancy Benoit fell squarely within the newsworthiness exception. We reverse.

A. Background

Maureen Toffoloni is the mother and the administrator of the estate of Nancy Benoit. Benoit and her son, both Georgia residents, were murdered by her husband, Christopher Benoit, in June 2007. Christopher Benoit then committed suicide. Prior to her death, Benoit was a model and professional woman wrestler. Christopher Benoit was a well-known professional wrestler. Their deaths garnered a great deal of domestic and international media attention.

Approximately twenty years before her death, Benoit posed nude for photographer Mark Samansky, who took both photographs and a video of her. Toffoloni alleges that, immediately after the shoot, her daughter asked Samansky to destroy the photographs and video and believed that Samansky had destroyed them. However, Samansky kept the video, from which he extracted nude and partially nude photographic stills of Benoit. Samansky conveyed the photographic stills to LFP, which published them in the March 2008 issue of *Hustler* magazine.

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*Honorable Richard W. Goldberg, United States Court of International Trade, sitting by designation.

In February 2008, Toffoloni brought suit against LFP in Georgia state court, seeking to enjoin the publication of the photographs and seeking damages for violation of Benoit's right of publicity. LFP removed the case to the United States District Court for the Northern District of Georgia. On October 6, 2008, the district court granted LFP's motion to dismiss for failure to state a claim, concluding that "there is no dispute that Ms. Benoit's death was a 'legitimate matter of public interest and concern.' Therefore the publication of Ms. Benoit's nude photographs cannot be described as a mere commercial benefit for [LFP] - although [LFP] (like nearly all journalistic outlets) no doubt seeks to profit from its publications." *Toffoloni v. LFP Publ'g Grp.*, No. 1:08-CV-421-TWT, 2008 U.S. Dist. LEXIS 82287, at *6 (N.D. Ga. 2008). Toffoloni appealed to the United States Court of Appeals for the Eleventh Circuit.

B. The Right of Publicity Under Georgia Law

Georgia recognizes a right of publicity to protect against "the appropriation of another's name and likeness . . . without consent and for the financial gain of the appropriator . . . whether the person whose name and likeness is used is a private citizen, entertainer, or . . . a public figure who is not a public official." *Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 703 (Ga. 1982). "The right of publicity may be defined as [an individual's] right to the exclusive use of his or her name and likeness." *Id.* at 700 (citation omitted). Violation of the right of publicity is a state tort. *Id.* at 703. *See also Alonso v. Parfet*, 325 S.E.2d 152, 153 (Ga. 1985) ("The courts in this state have long recognized that one who makes an unsanctioned appropriation of another's name or likeness for his own benefit may be liable to that person in tort.") (citation omitted).

The right of publicity grew out of a long-standing recognition of the right to privacy under Georgia law. *See Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 69-81 (Ga. 1905). Rooted in the right to privacy, the right of publicity is also characterized by an economic concern that individuals be allowed to control the use of their image in order to maximize the profit they can receive from its publication. We will first discuss the privacy right underpinnings of the right of publicity and then turn to its economic element.

I. The Right to Privacy Underpinning the Right of Publicity

As the Supreme Court of Georgia has explained, "to each individual member of society there are matters private, and there are matters public so far as the individual is concerned." *Pavesich*, 50 S.E. at 69. "All will admit that the individual who desires to live a life of seclusion can not be compelled, against his consent, to exhibit his person in any public place, unless such exhibition is demanded by the law of the land." *Id.* at 70. Thus, "[t]he right of privacy within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guaranteed to persons in [Georgia] by the constitutions of the United States and of the State of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law." *Id.* at 71.

Furthermore, "[o]ne who desires to live a life of partial seclusion has a right to choose the times, places, and manner in which and at which he will submit himself to the public gaze." *Id.* at 70. "The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law is also embraced within the right of personal liberty." *Id.* Importantly, the Supreme Court of Georgia has specifically held that, except as required by law, "the body of a person can not be put on exhibition at any time or at any place without his consent." *Id.*

Concern about the publication of private photographs of individuals without their consent fueled Samuel Warren's and Justice Louis Brandeis' famous article, "The Right to Privacy," which was substantially relied upon by the Supreme Court of Georgia in *Pavesich*, when the court first recognized the right to privacy. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890); *Pavesich*, 50 S.E. at 74-75. Warren and Brandeis maintained as follows:

> Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone." Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops". . . . [t]he law must afford some remedy for the unauthorized circulation of portraits of private persons. . . .

Warren & Brandeis, 4 HARV. L. REV. at 195. Relying on Warren and Brandeis, the Supreme Court of Georgia sought to protect individuals from exhibition against their will by recognizing the right to privacy.

The tort of invasion of privacy protects the right "to be free from unwarranted publicity, . . . or the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs *with which the public had no legitimate concern.*" *Gouldman-Taber Pontiac, Inc. v. Zerbst,* 100 S.E.2d 881, 882 (Ga. 1957) (emphasis added) (internal quotation marks, citation, and alterations omitted). From this right to be free of the public's illegitimate gaze, Georgia extrapolated a right of publicity– a right to control if, when, and under what circumstances one's image is made public and subject to scrutiny.

Georgia first recognized the right of publicity in *Cabaniss v. Hipsley*, 151 S.E.2d 496 (Ga. Ct. App. 1966). The court held that the plaintiff, who was an exotic dancer, could recover from the Atlanta Playboy Club for its unauthorized use of her photograph in an entertainment magazine advertising the club. The court explained that "[u]nlike intrusion, disclosure, or false light, appropriation does not require the invasion of something secret, secluded or private pertaining to plaintiff, nor does it involve falsity. It consists of the appropriation, for the defendant's benefit, use or advantage, of the plaintiff's name or likeness. . . . The interest protected . . . is not so much a mental as a proprietary one, in the exclusive use of the plaintiff's name and likeness as an aspect of his identity." *Id.* at 503-4 (internal quotation marks and citations omitted). Since the right of publicity is a "proprietary" right, "the measure of damages is the value of the use of the appropriated publicity." *Martin Luther King*, 296 S.E.2d at 703.

Subsequent to *Cabaniss*, the Georgia courts have expanded the right of publicity to "recognize[] the rights of private citizens, as well as entertainers, not to have their names and photographs used for the financial gain of the user without their consent, where such use is not authorized as an exercise of freedom of the press." *Id.* (citations omitted). Additionally, the Supreme Court of Georgia held "that the right of publicity survives the death of its owner and is inheritable and devisable." *Id.* at 705.

The Restatement (Second) of Torts, however, tempers the right of publicity, providing that:

> No one has the right to object merely because his name or his appearance is brought before the public, *since neither is in any way a private matter, and both are open to public observation.* It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right to privacy is invaded.

RESTATEMENT (SECOND) OF TORTS § 652C cmt. d (1977) (emphasis added). Thus, the Restatement clarifies that the right of publicity does not attach to that which is "open to public observation." *Id.* Accordingly, the right of publicity must attach to that which is not open to public observation and is appropriated for the commercial benefit of another.[1]

II. Economic Concerns Inherent in the Right of Publicity

The Supreme Court of the United States has underscored the economic concern inherent in recognition of a right of publicity. The Supreme Court considered the right of publicity in a case where a broadcasting company transmitted an entertainer's entire performance without his permission, essentially appropriating the entertainer's potential viewing audience. The Court held:

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[1] "It is not the manner in which information has been obtained that determines whether it is public or private. . . . The offense with which we are here involved is not the intrusion by means of which information is obtained; it is the publicizing of that which is private in character. The question, then, is whether the information disclosed was public rather than private – whether it was generally known and, if not, whether the disclosure . . . can be said to have been to the public at large." *Virgil v. Time, Inc.*, 527 F.2d 1122, 1126 (9th Cir. 1975) (citation omitted).

> [t]he rationale for [protecting the right of publicity] is the straight-forward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.

Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576, 97 S. Ct. 2849, 2857 (1977) (internal quotation marks and citation omitted). Thus, when a media outlet appropriates "some aspect" of an individual "that would have market value and for which he would normally pay," without that individual's permission, the media outlet is subject to damages in a tort suit for violation of the right of publicity. *Id.*

C. The "Newsworthiness" Exception to the Right of Publicity

The right to privacy and corresponding right of publicity are necessarily in tension with the First Amendment's protection of freedom of speech and of the press. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I. Additionally, the Georgia state constitution provides that "[e]very person may speak, write, and publish sentiments on all subjects but shall be responsible for the abuse of that liberty." GA. CONST. art. I, § I, para. V. As the Supreme Court of Georgia has explained, "[t]he right preserved and guaranteed against invasion by the constitution is therefore the right to utter, to write, and to print one's sentiments, subject only to the limitation that in so doing he shall not be guilty of an abuse of this privilege by invading the legal rights of others." *Pavesich*, 50 S.E. at 73.

Both the rights to freedom of speech and freedom of the press, as guaranteed by the First Amendment, and the right to privacy, as guaranteed by the Due Process Clause, are fundamental constitutional rights. The Constitution directs no hierarchy between them. Thus, courts are required to engage in a fact-sensitive balancing, with an eye toward that which is reasonable and that which resonates with our community morals, in order to protect the Constitution as a whole.

In order to navigate between the competing constitutionally protected rights of privacy and publicity and the rights of freedom of speech and of the press, the Georgia courts have adopted a "newsworthiness" exception to the right of publicity. The Supreme Court of Georgia has held that "where an incident is a matter of public interest, or the subject matter of a public investigation, a publication in connection therewith can be a violation of no one's legal right of privacy." *Waters v. Fleetwood*, 91 S.E.2d 344, 348 (Ga. 1956).

The Georgia Supreme Court has further distinguished commercial use from newsworthy use, stating that "[t]here is in the publication of one's picture for advertising purposes not the slightest semblance of an expression of an idea, a thought, or an opinion, within the meaning of the constitutional provision which guarantees to a person the right to publish his sentiments on any subject." *Pavesich*, 50 S.E. at 80. Accordingly, where a publisher may be precluded by the right of publicity from publishing one's image for purely financial gain, as in an advertisement, where the publication is newsworthy, the right of publicity gives way to freedom of the press.[2]

D. Analysis of LFP's Publication of the Nude Photographs

This case requires us to consider the nature and extent of the newsworthiness exception to the right of publicity. "It is in the determination of newsworthiness – in deciding whether published or broadcast material is of legitimate public concern

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[2]The Supreme Court of California has identified a number of factors to be considered when a court determines whether a particular fact qualifies as newsworthy.

> Among the factors to consider are the depth of the intrusion into the plaintiffs private affairs, the extent to which the plaintiff voluntarily pushed himself into a position of public notoriety . . . and whether the information is a matter of public record. . . . The weighing process continues in light of the circumstances prevailing at the time of publication.

Forsher v. Bugliosi, 608 P.2d 716, 727 (Cal. 1980). We agree that each of these factors is potentially relevant to determining whether the published fact could reasonably be considered newsworthy.

– that courts must struggle most directly to accommodate the conflicting interests of individual privacy and press freedom." *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 479 (Cal. 1998). Toffoloni argues that she should be allowed to sue for damages incident to the publication of nude pictures of her deceased daughter because those photographs were published against her express direction and were violative of her daughter's right of publicity. LFP responds that it published an article on the life, career, and tragic death of Benoit, which "includes comment on the modest beginnings of Ms. Benoit's career, and is accompanied by images of Ms. Benoit from that time." LFP argues that the article and related images are of substantial public interest and are therefore newsworthy.

Our resolution of this case commands an intensive review of both the relationship between the published photographs and the corresponding article, as well as the relationship between the published photographs and the incident of public concern – Benoit's murder. We review the district court's grant of LFP's motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6), *de novo*. *Berman v. Blount Parrish & Co.*, 525 F.3d 1057, 1057 (11th Cir. 2008).

I. The Incidental Relationship Between the Article and Photographs

First, it seems clear that had LFP published the nude photographs of Benoit by themselves– i.e., without a corresponding news article– the publication would not qualify within the newsworthiness exception. The fact of Benoit's nudity is not in and of itself newsworthy. "While one who is a public figure or is presently newsworthy may be the proper subject of news or informative presentation, the privilege does not extend to commercialization of his personality through a form of treatment distinct from the dissemination of news or information." *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485, 488 (N.Y. 1952) (citations omitted). The nude photographs "impart[] no information to the reading public." *McCabe v. Vill. Voice, Inc.*, 550 F. Supp. 525, 530 (E.D. Pa. 1982). The photographs, by themselves, serve no "legitimate purpose of disseminating news . . . and needlessly expose[] aspects of the plaintiff's private life to the public." *Id.* (internal quotation marks and citations omitted). Indeed, people are nude every day, and the news media does not typically find the occurrence worth reporting.

Here, however, LFP published the photographs alongside a biographical piece on Benoit's career. The biographical piece, in and of itself, certainly falls within the newsworthiness exception. *See generally Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S. Ct. 876 (1988). The question before us is whether a brief biographical piece can ratchet otherwise protected, personal photographs into the newsworthiness exception.

As the Second Circuit has held, "it is appropriate for a court to consider whether the public interest aspect of the publication is merely incidental to its commercial purpose." *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85, 87-88 (2d Cir. 1989) (internal quotation marks and citation omitted). Although LFP argues that the photographs were illustrative of the substantive, biographical article included in *Hustler*, our review of the publication demonstrates that such is not the case. These photographs were not incidental to the article. Rather, the article was incidental to the photographs.

The magazine cover advertises "WRESTLER CHRIS BENOIT'S MURDERED WIFE NUDE." The table of contents lists "NANCY BENOIT Exclusive Nude Pics of Wrestler's Doomed Wife." Neither the cover nor the table of contents makes any reference to the accompanying article. The article is entitled "NANCY BENOIT Au Naturel: The long-lost images of wrestler Chris Benoit's doomed wife." The title and page frame, which reads "EXCLUSIVE PICS! EXCLUSIVE PICS!," comprise about one-third of the first page. A second third of the page is devoted to two nude photographs of Benoit. The final third of the page discusses Benoit's murder and her nude photo shoot, twice referencing her brief desire to be a model. The second page of the article is entirely devoted to photographs, displaying eight additional photographs of Benoit. The heart of this article was the publication of nude photographs– not the corresponding biography.

The *Martin Luther King, Jr., Center for Social Change* case is particularly relevant here. In that case, the Supreme Court of Georgia answered several certified questions about the existence and extent of the right of publicity under Georgia law in the context of whether the Martin Luther King, Jr., Center for Social Change, Inc. and Coretta Scott King, as administratrix of Dr. King's estate, possessed a right of publicity in Dr. King's image. *Martin Luther King*, 296 S.E.2d at 699. The plaintiffs argued that their right of publicity was violated when B&S Sales manufactured and sold a plastic bust of Dr. King without their permission. Although the opinion does not deal expressly with the "newsworthiness" exception to the right of publicity, the Supreme Court of Georgia specifically notes that B&S Sales offered a free biographical booklet detailing "the life of Dr. King entitled 'A Tribute to Dr. Martin Luther King, Jr.,'" alongside the bust. *Id.* at 698. The court did not conclude that the booklet rendered Dr. King's image, in and of itself, newsworthy. Rather, the opinion treats the existence of the booklet as irrelevant. The booklet was merely incidental to the bust. Without more, Dr. King's estate's right of publicity in his image could trump freedom of speech and the press.

We are convinced that the Supreme Court of Georgia would find similarly here. LFP's brief biography of Benoit's life, even with its reference to her youthful pursuit of modeling, is merely incidental to its publication of her nude photographs. Therefore, the biographical piece cannot suffice to render the nude photographs newsworthy.

II. Relationship of the Photographs to the Incident of Public Concern

Furthermore, we are convinced that the nude photographs are not connected to the incident of public concern. LFP would have us rule that someone's notorious death constitutes a carte blanche for the publication of any and all images of that person during his or her life, regardless of whether those images were intentionally kept private and regardless of whether those images are of any relation to the incident currently of public concern. We disagree.

The Georgia courts have never held, nor do we believe that they would hold, that if one is the victim of an infamous murder, one's entire life is rendered the legitimate subject of public scrutiny. Such a ruling would eviscerate the Georgia right of publicity, allowing the exception to swallow the rule. Rather, the Georgia courts have consistently indicated that there are timeliness or relatedness boundaries that circumscribe the breadth of public scrutiny to the incident of public interest.

For example, in *Tucker v. News Publishing Company*, 397 S.E.2d 499 (Ga.

Ct. App. 1990), the court recognized that "through no fault of his own, [the] appellant [who had been attacked] became the object of public interest." *Id.* at 500 (internal quotation mark omitted). The attack itself "necessarily became a matter of legal investigation and the subject matter of public records." *Id.* Thus, the court concluded "*[d]uring the pendency and continuation of the investigation*, and until such time as the perpetrator[s] of the crime may be apprehended and brought to justice under the rules of our society, the matter will continue to be one of public interest, and the dissemination of information pertaining thereto would not amount to a violation of [appellant's] right of privacy." *Id.* (internal quotation marks and citation omitted) (emphasis added). The court expressly envisioned outside boundaries to the realm of public scrutiny: "the matter [of] public interest" and the "time [that] the perpetrator[s] of the crime may be apprehended and brought to justice. . . ." *Id.* (internal quotation marks and citation omitted).

Similarly, in *Ramsey v. Georgia Gazette Publishing Company*, 297 S.E.2d 94, 96 (Ga. Ct. App. 1982), the court recognized that the "plaintiff has, albeit unwillingly, become an actor in a public drama." As such, "[d]issemination of information *pertaining to this drama* is no violation of the plaintiff's right of privacy." *Id.* (emphasis added). Correspondingly, we conclude that the Georgia courts would find that dissemination of information that does not pertain to the "drama" at hand *may* violate an individual's right of privacy. Although the Georgia courts have not said that public scrutiny is circumscribed solely to the details of the newsworthy event itself, the Georgia courts have required reasonable timeliness and relatedness boundaries.

When determining where such boundaries should be drawn, we are guided by the commentary on the permissible publicity of private facts in the Restatement (Second) of Torts. The Restatement recognizes that, although an individual may be rendered subject to public scrutiny by some newsworthy event, "[t]he extent of the authority to make public private facts is not . . . unlimited." RESTATEMENT (SECOND) OF TORTS § 652D cmt. h. The Restatement concludes that even public figures, like actresses, may be "entitled" to keep private "some intimate details . . . such as sexual relations. . . ." *Id.* "The line is to be drawn when the publicity ceases to be the giving of information to which the public is *entitled*, and becomes a morbid and sensational prying into private lives for its own sake, *with which a reasonable member of the public, with decent standards, would say that he had no concern.*" *Id.* (emphasis added). The Restatement expounds that "[t]he limitations . . . are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure." *Id.* Furthermore, "*[s]ome reasonable proportion is also to be maintained between the event or activity that makes the individual a public figure and the private facts to which publicity is given.*" *Id.* (emphasis added).

Here, the published nude photographs were in no conceivable way related to the "incident of public concern" or current "drama"– Benoit's death. The district court erred in its reliance upon *Waters v. Fleetwood*, 91 S.E.2d 344 (Ga. 1956), in which the Supreme Court of Georgia "found no actionable right when a defendant featured gratuitous, sensational photographs alongside a legitimate news article" to direct the dismissal of Toffoloni's claim. *Toffoloni*, No. 1:08-CV-421-TWT, at *6. In *Waters*, a newspaper published photographs of a murdered child's deceased body, as illustrative of an article about her murder and the subsequent investigation. Benoit's situation is distinct from the situation in *Waters*. In *Waters*, the offensive photographs were of the child's deceased body, and as such were directly related to the "incident of public interest" – the child's death. LFP published photographs of Benoit that were at least twenty years old to correspond to a brief discussion about her aspiring career as a model. Those photographs had no relation to her death. Her aspiring nude modeling career at no time developed into an incident of public concern, and for good reason– Benoit sought the destruction of all of those images.

LFP may not make public private, nude images of Benoit that she, allegedly, expressly did not wish made public, simply because she once wished to be a model and was then murdered. "[W]hen a person is involuntarily involved in a newsworthy incident, not all aspects of the person's life, and not everything the person says or does, is thereby rendered newsworthy." *Shulman*, 955 P.2d at 484.

We agree with the Ninth Circuit that "[m]ost persons are connected with some activity, vocational or avocational, as to which the public can be said as a matter of law to have a legitimate interest or curiosity. To hold as a matter of law that private facts as to such persons are also within the area of legitimate public interest could indirectly expose everyone's private life to public view." *Virgil,* 527 F.2d at 1131.

Moreover, we are guided by the Tenth Circuit's conclusion that "[b]ecause each member of our society at some time engages in an activity that fairly could be characterized as a matter of legitimate public concern, to permit that activity to open the door to the exposure of any truthful secret about that person would render meaningless the tort of public disclosure of private facts." *Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 308 (10th Cir. 1981). We agree with the Tenth Circuit that the First Amendment "does not require such a result. Therefore, to properly balance freedom of the press against the right of privacy, *every private fact disclosed in an* *otherwise truthful, newsworthy publication must have some substantial relevance to a matter of legitimate public interest.*" *Id.* (emphasis added). *See also Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993) ("An individual, and more pertinently perhaps the community, is most offended by the publication of intimate personal facts when the community has no interest in them beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger.").

The photographs published by LFP neither relate to the incident of public concern conceptually nor correspond with the time period during which Benoit was rendered, against her will, the subject of public scrutiny. The photographs bear no relevance– let alone "substantial relevance"– to the "matter of legitimate public interest." *Gilbert*, 665 F.2d at 208. On these facts, were we to hold otherwise, LFP would be free to publish any nude photographs of almost anyone without their permission, simply because the fact that they were caught nude on camera strikes someone as "newsworthy." Surely that debases the very concept of a right to privacy.

III. Economic Ramifications of LFP's Publication of the Photographs

Finally, we are guided by the Seventh Circuit's opinion in *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985), to conclude that LFP may be held liable in damages for violation of the right of publicity when it published images of Benoit that had economic value without her permission– let alone without compensating her estate.

The *Douglass* case has many similarities to this case. Robyn Douglass posed nude for *Playboy* magazine and images from that shoot were published in *Playboy*. Later, *Hustler* ascertained other, previously unpublished photographs of Douglass from the photographer and published them in *Hustler* without Douglass' permission and without compensating her. *Hustler* published these images alongside biographical information about Douglass' acting career. Douglass brought suit seeking compensation for the violation of her right of publicity. Much like in this case, *Hustler* argued that Douglass was newsworthy and that "Robyn Douglass Nude" was fair comment on her career.

The Seventh Circuit disagreed:

> Robyn Douglass or her agents must have control over the dissemination of her nude photographs if their value is to be maximized. *Hustler* can run a story on her and use any photographs that are in the public domain or that it can buy but it cannot use photographs made by others for commercial purposes and (temporarily) withheld from public distribution.
>
> The unauthorized publication did impair the commercial exploitation of Douglass'[] talents, though probably not as much as she asserts and mainly because of where they were published. But an important aspect of the 'right of publicity' is being able to control the place as well as time and number of one's public appearances; for example, no celebrity sells his name or likeness for advertising purposes to all comers. In any event, Douglass was not paid by

Hustler for the right to publish nude photos of her.

Id. at 1138-39 (citation omitted). Likewise, LFP has published photographs of Benoit in *Hustler* without the permission of her estate and without compensation and attempts to justify their publication as comment on her career.

Notably, the primary difference between Douglass' case and Benoit's case is that Benoit does not seem to have ever sought to have nude photographs of herself published. As stated by the Supreme Court of Georgia, "a person who avoids exploitation during life is entitled to have his image protected against exploitation after death just as much *if not more than* a person who exploited his image during life." *Martin Luther King*, 296 S.E.2d at 706 (emphasis added).

We agree with the Seventh Circuit that this "unauthorized publication" impaired "the commercial exploitation" of Benoit's image. Certainly, "an important aspect of the 'right of publicity' is being able to control the place as well as time and number of one's public appearances. . . ." *Douglass*, 769 F.2d at 1138. Crude though the concept may seem in this context, Toffoloni is entitled to control when and whether images of her daughter are made public in order to maximize the economic benefit to be derived from her daughter's posthumous fame.

D. Conclusion

These private, nude photographs were not incident to a newsworthy article; rather, the brief biography was incident to the photographs. Additionally, these photographs were neither related in time nor concept to the current incident of public interest. We hold that these photographs do not qualify for the newsworthiness exception to the right of publicity. Accordingly, we reverse and remand for further proceedings.

REVERSED AND REMANDED.